73-843

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IN THE

Supreme Court of the United States

NO. 73-1572

LYKES BROS. STEAMSHIP CO., INC., *Petitioner*

v.

M. F. BROWN, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

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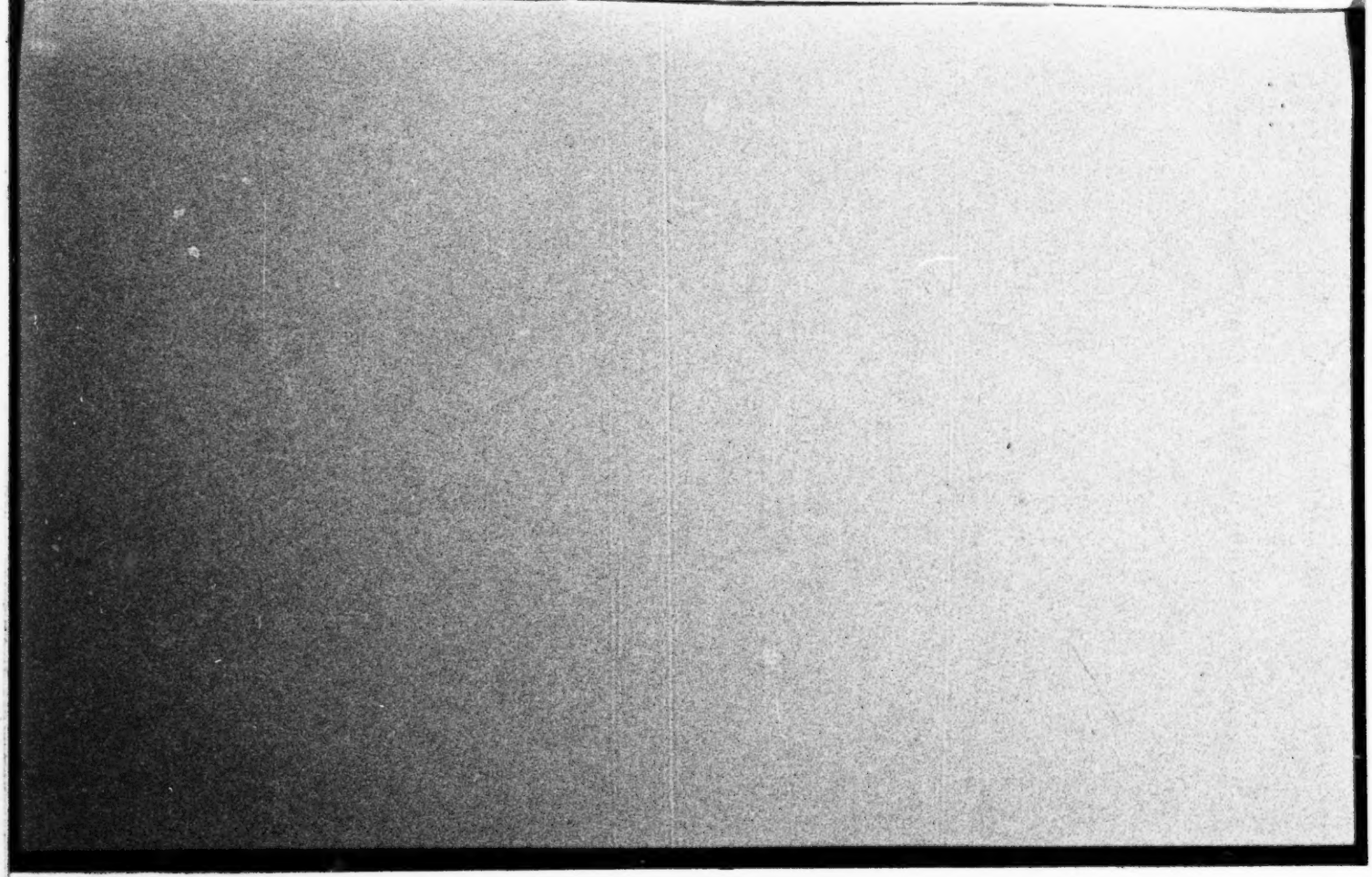

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LYKES BROS. STEAMSHIP CO., INC., *Petitioner*

v.

M. F. BROWN, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled case.

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Southern District of Texas, Houston Division, is unreported, but the Court's Opinion is printed as Appendix "A" to this Petition. The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 484 F.2d 61 (5th Cir., 1973), and this Opinion is printed as Appendix "B" to this Petition.

JURISDICTION

The Judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on August 31, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1.

Whether the warranty of seaworthiness owed by the vessel owner to a longshoreman is breached as a matter of law by the "near violation" of one of the Safety & Health Regulations for Longshoring without further inquiry into the reasonable fitness of the vessel for its intended purpose.

2.

Whether the actual or "near violation" of one of the Safety & Health Regulations for Longshoring eliminates contributory negligence as a mitigating factor in determining damages.

3.

Whether the vessel owner is entitled to a panel of Circuit Judges who will take the time necessary to understand the positions advanced on appeal.

STATEMENT OF THE CASE

M. F. Brown was employed as a longshoreman onboard the SS LIPSCOMB LYKES on April 17, 1971. The longshoremen reported to work at approximately 1:00 P.M. for the purpose of loading 450 bales of cotton cargo in the forward half of the No. 1 lower hold. At approximately 3:00 P.M. the longshoremen on the offshore side of the vessel (Respondent Brown, Denton, Vaughn and Phillips) were working in the hatch square completing a floor of cotton cargo. Respondent Brown was acting as the "sling man," and he was responsible for unhooking the cotton sling from the cargo hook, rehooking the sling to the cargo hook, and insuring that the cotton sling was free from obstructions before the winch opera-

tor pulled the sling from beneath the load. As the sling was being pulled from beneath the load, it hung on an obstruction, and this caused the bale within the recently landed load to shift. Brown was standing between the load and the end of the stow, approximately two or three feet from the edge of the stow. One of the bales struck Brown, and he fell with resulting injuries to his back.

Even though there was a substantial dispute at trial and on appeal concerning the height of the stow at the time of Brown's injury, the Petitioner accepts the finding of the District Court as affirmed by the Court of Appeals that such cargo was "8 feet."[1] Additionally, prior to trial the Petitioner conceded that a safety rope or net had not been installed at the edge of the stow prior to the accident due to the fact that one was not necessary. On the basis of these two facts, liability was imposed against the shipowner as a matter of law because of the failure to comply with the Safety & Health Regulations for Longshoring.[2] The regulations[3] required a safety net to be installed when the stow was "*more than* 8 feet high;" however, the facts found by the Courts below establish that the regulation was not actually violated since the stow was eight feet in height.

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1. Appendix "B", *infra*, p. 24.

2. Appendix "B", *infra*, p. 24.

3. The Courts below cited 29 C.F.R. §1918.32(b) (1972) as the applicable regulation; however, this injury occurred on April 17, 1971, and the applicable regulation was actually 29 C.F.R. §1504.32(b). This regulation was not changed by the 1972 amendment and reads as follows:

> "When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the circumstances."

REASONS FOR GRANTING THE WRIT

The Petitioner attacks the Judgment entered by the District Court and affirmed by the United States Court of Appeals for the Fifth Circuit holding that the vessel owner breached its warranty of seaworthiness owed to Respondent longshoreman by a "near violation" of one of the Safety & Health Regulations for Longshoring. This decision upholds an unwarranted abridgment of the concept of seaworthiness by equating the regulations enacted to govern the relationship between stevedores and longshoremen with unseaworthiness without considering whether the vessel is reasonably fit for its intended purpose. This codified standard of seaworthiness owed by the vessel owner to the longshoremen eliminates the function of the Court in applying traditional tests of seaworthiness, and it results in a sterile application of rules to judge seaworthiness without reference to the traditional standard formulated by this Court.[4]

This decision further expands the Fifth Circuit rule of automatically equating the regulations with seaworthiness, which principle is in confiict with the effect given the Safety and Health Regulations for longshoring by both the Second and Fourth Circuits. Moreover, irrespective of the effect of a violation of the regulations, this decision extends the warranty of seaworthiness beyond permissible bounds by holding that a "near violation" of one of these regulations, without other evidence or findings, is sufficient to establish liability as a matter of law. Even if the Safety & Health Regulations for Longshoring constitute a codified standard of seaworthiness without respect to an analysis of the situation, the imposition of

4. *Mitchell v. Trawler RACER*, 362 U.S. 539, 4 L.Ed.2d 941, 80 S.Ct. 926 (1960).

unseaworthiness because of a "near violation" of such regulation is an arbitrary and illogical rule. Hence, this decision must be reversed on the simple principle that the facts stated by the Courts below do not demonstrate the breach of a regulation, and unseaworthiness *per se* cannot be imposed against the vessel owner because of a "near violation."

This decision also implies that the conduct of a longshoreman bringing into play an unseaworthy condition, or acting in utter and complete disregard of such unseaworthy condition, cannot be taken into consideration in mitigation of the damages as required by the principle of comparative negligence in the admiralty and maritime law of the United States.

In view of these important and unjustified inroads and intrusions upon established principles of seaworthiness and comparative negligence in the admiralty and maritime law of the United States, the Petitioner requests this Court to review the Judgment of the lower Courts and reverse the holding that a "near violation" of a statute or regulation is sufficient to constitute unseaworthiness as a matter of law.

1.

THE DECISION BELOW IS AN UNJUSTIFIED AND IMPROPER CODIFICATION OF THE CONCEPT OF SEAWORTHINESS IN THE ADMIRALTY AND MARITIME LAW OF THE UNITED STATES, AND SUCH DECISION IS IN CONFLICT WITH DECISIONS FROM THE SECOND AND FOURTH CIRCUITS.

The decision below holds that the vessel owner is cast in liability as a matter of law when one of the Safety &

Health Regulations for Longshoring is "nearly" violated. The decisions of this Court have not extended the warranty of seaworthiness to include absolute liability *per se* upon the finding of an "actual violation" of any of these rules established by the Department of Labor to administer working conditions as between stevedores (employers) and longshoremen (employees). The adoption of the unseaworthiness *per se* principle by the Court of Appeals for the Fifth Circuit is clearly unwarranted as the regulations avoid placing "additional responsibilities or duties on vessel owners."[5] In fact, the imposition of liability for even an "actual violation" of such regulations against a Yaka defendant (shipowner and employer) would be directly opposed to other provisions in the same statute. The Longshoremen's & Harbor Worker's Compensation Act (33 U.S.C. § 941) authorized the Secretary of Labor to establish such regulations; however, §§ 904, 905 provide that compensation is the employers' "exclusive" liability. The principle of unseaworthiness *per se* for a violation of these regulations was not intended by Congress, and such an interpretation constitutes a judicial repeal of 33 U.S.C. § 905.[6]

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5. 29 C.F.R. §1504.2(b) provides as follows:
"It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or Masters of vessels unless such persons are acting employers, nor is it the intent of these regulations to relieve such owners, operators, agents or Masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

6. In *Reed v. Yaka*, 373 U.S. 410, 415, 10 L.Ed.2d 448, 452, 453, 83 S.Ct. 1349, 1354 (1963) the Court held that 33 U.S.C. §905 did not allow an employer-shipowner to escape "the traditional, absolute, and non-delegable obligation of unseaworthiness." The basis of this decision was "it would produce harsh and incongruous results, one out of keeping with the dominant intent of Congress to help longshoremen to distinguish between liability to longshoremen injured under

This unseaworthiness *per se* principle is not supported by any decision from this Court, and the decisions of the various Circuit Courts demonstrate that the approach adopted by the Court of Appeals for the Fifth Circuit is not followed by the Second and Fourth Circuits. Also, a lack of case authority from the other Circuit Courts concerning the relevance of the Safety & Health Regulations for Longshoring to this type litigation clearly indicates a lack of support for this unseaworthiness *per se* principle advanced by the Court of Appeals for the Fifth Circuit.

Provenza v. American Export Lines, Inc., 324 F.2d 660, 666 (4th Cir., 1963)[7] is the leading case from the Fourth Circuit concerning the effect given a violation of the regulations:

> "A more reasonable reading and one that observes both the language and the spirit is that *no new duty* is to be exacted where none existed before and, equally, *no existing duty* is to be excused by reason of the regulation; but the regulation's requirement

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precisely the same condition because some draw their pay directly from a shipowner and others from a stevedore company doing the ship's service." Therefore, all longshoremen are equal insofar as the general maritime law is concerned, and it follows that shipowners are treated in a similar manner with respect to other aspects of general maritime litigation.

7. The decision in *Provenza v. American Export Lines, Inc., supra,* has been consistently approved by other decisions of the Fourth Circuit; however, Judge Sobeloff specifically refused to "subscribe to the narrow role of the regulation" in *Venable v. A/S Det Forenede Dampskibsselskab,* 399 F.2d 347, 354 (4th Cir. 1958). Nevertheless, *Green v. Vantage Steamship Corp.,* 406 F.2d 159, 170 (4th Cir. 1972) acknowledged that a breach of such regulation "may render a vessel unseaworthy" rather than "shall" render the vessel unseaworthy as a matter of law. Apparently, the decisions of the Fourth Circuit are not consistent with respect to the effect given to a violation of the Health & Safety Regulations for Longshoring.

> may be considered by the trier of fact in determining whether its nonperformance has resulted in a failure to meet a duty incumbent upon the defendant . . . The owner's duty does not stem from the regulation, but the regulation may be shown just like other evidence to indicate that a certain practice is safe or unsafe. *While such evidence is not conclusive, it is relevant.*" (Emphasis supplied)

The effect given a breach of a regulation by the Court of Appeals for the Second Circuit is provided in *Albanese v. N. V. Nederl. Amerik Stoomv Maats,* 346 F.2d 481 (2d Cir. 1965) reversed on other grounds, 382 U.S. 283, 15 L.Ed.2d. 327, 86 S.Ct. 429, reh. den. 382 U.S. 1000, 1030, 15 L.Ed.2d 490, 544, 86 S.Ct. 534, 644 (1965).[8] This decision recognized that the regulations did not intend to place additional duties or responsibilities on the vessel owner. The Second Circuit employed the following language in holding that the Trial Court's instruction as to the binding effect of the Regulations on the shipowner was erroneous:

> "There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety & Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of Section 9.2(b) and the lack of any

8. In *Albanese v. N.V. Nederl. Amerik Stoomv. Maats, et al, supra,* this Court did not specifically consider the effect of these regulations in determining the vessel owner's liability to an injured longshoreman. This Court was convinced that the Second Circuit did not hold the improper instruction given by the District Court to the jury concerning the effect of these regulations as an independent basis for reversal of the District Court's decision. The District Court instructed the jury that the regulations were binding on the shipowner, but the Second Circuit held that this was error and that such regulations were not binding on a shipowner.

> testimony as to what the concentration of carbon monoxide in the hold in fact was. *Ordinarily, such regulations of stevedoring practices are not relevant to issues involved in claims against the shipowner,* and clearly could only confuse the issue here, where, although it was stipulated the ship's blowers were adequate if used, there was no evidence from which the jury could determine where the level of gas concentration which the stevedore was prevented to work without blowers had in fact been reached." (Emphasis supplied)

The Court of Appeals for the Fifth Circuit expanded the effect of a violation of the regulations in *Manning v. MV SEA ROAD,* 417 F.2d 603 (5th Cir. 1969). For the first time, an Appellate Court concluded that the violation of a regulation automatically imposed liability against the vessel owner as a matter of law with no further inquiry being necessary. The development of this principle by the Court of Appeals for the Fifth Circuit continued in *Phipps v. Santa Maria,* 418 F.2d 615 (5th Cir. 1969) and *Carey v. Lykes Bros. Steamship Co., Inc.,* 455 F.2d 1192 (5th Cir. 1972). Finally, in *Denny v. Jugoslavenska Oceanska Plovidba,* 455 F.2d 1277 (5th Cir. 1972) the Fifth Circuit expanded the *Manning* decision to include a technical violation of the regulations as follows:

> "The trial court distinguished *Manning* from the facts of this case by finding that *Manning* was intended only to prevent the imposition of the entire loss on the longshoreman where there was a flagrant violation of a safety regulation, not where there was, as here, what it termed a technical violation. We do not read *Manning* with such myopic vision. These regulations were meant to eliminate 'the risk of injury to all longshoremen, not just longshoremen who

> are 100%-plus prudent.' *Manning, supra,* 417 F.2d at 609. See *Burrage v. Flota Mercante Grancolumbiana, S.A.,* 5 Cir. 1970, 431 F.2d 1229, 1232. Once it is established that the injury could not have occurred without the breach of the regulations, as here and as in *Manning,* the district court must determine the comparative fault of the parties and apportion the damages accordingly."

The present case represents but another extension of this doctrine into the admiralty and maritime law of the United States. In this instance, the Court of Appeals for the Fifth Circuit has affirmed a Judgment rendering the vessel unseaworthy solely on the basis of a violation of the Safety & Health Regulations for Longshoring, when, in fact, the safety regulations have not been violated. In other words, even if this Court were to approve the approach adopted by the Fifth Circuit by holding the violation of the safety regulation constituted unseaworthiness per se, there is still a definite obligation on behalf of the injured party to show the violation of the regulation.[9] In this instance, the Courts below determined that the height of the stow was "8 feet" and found the vessel unseaworthy as a matter of law because a safety net was not rigged along the bulkhead.

Even though the Courts below imposed liability *per se* against the vessel owner because the height of the stow was "8 feet" and required a safety net, a reading of the regulation quoted by both the District Court and the Court of Appeals shows conclusively that the regulation was not violated in this case. The regulation is as follows:

> "When an edge of a hatch section or of stowed cargo *more than 8 feet high* is so exposed that it presents

9. *Kernan v. American Dredging Company,* 355 U.S. 426, 2 L. Ed.2d 382, 78 S.Ct. 394 (1958).

> a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by any other means providing equal protection under the circumstance." (Emphasis supplied)

Thus, in the Fifth Circuit decision, the step-by-step development of this unseaworthiness *per se* doctrine has progressed from the "flagrant violation" in *Manning* to the "technical violation" in *Denny* to the "near violation" in this case, and the Petitioner respectfully urges this Court to intervene and restore the traditional standards for judging unseaworthiness as formulated previously by this Court.[10]

Petitioner has demonstrated an extension of unseaworthiness unwarranted by any prior decisions of this Court and conflicting with decisions of other Circuits. The regulations are not applicable to shipowners in the Second Circuit; they constitute only an evidentiary rule in the Fourth Circuit; and they impose a rule of liability *per se* in the Fifth Circuit. This Court should grant Petitioner's writ for the purpose of reviewing the fallacious reasoning of the Court of Appeals for the Fifth Circuit and to clarify the conflict between the Circuits.

2.

THE DECISION BELOW PROVIDES A DEFINITE DETRIMENTAL EFFECT TO THE ESTABLISHED ADMIRALTY PRINCIPLE OF COMPARATIVE FAULT.

The trial court summarily stated that there was no contributory negligence on the part of Longshoreman

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10. *Mitchell v. Trawler RACER*, 362 U.S. 539, 4 L.Ed.2d 941, 80 S.Ct. 926 (1960).

Brown. No subordinate fact findings were given although it was shown conclusively that the injured longshoreman placed himself in a dangerous position and appreciated the danger; however, he refused to correct the situation, and, in fact, brought about his injury by failing to safely extract the cotton sling. Even though the Court of Appeals generally requires subsidiary fact findings upon which to evaluate a legal conclusion of "no contributory negligence",[11] the Court of Appeals merely stated that in this case the "subsidiary fact inheres in the finding of an ultimate fact,"[12] and a remand was not necessary. The Petitioner can only assume that the Court of Appeals does not require a factual determination of the longshoreman's negligence when a safety regulation is violated because such violation places the burden on the employer rather than the employee[13] This deletion of contributory negligence in cases involving violations of the regulations is in direct conflict with the established principle of comparative negligence in the admiralty and maritime law.

In *Manning v. Sea Road, supra,*[14] the Fifth Circuit reversed the District Court's finding that the plaintiff's injuries were caused 100% by the plaintiff's negligence, and the Court of Appeals concluded that the breach of a

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11. *Lettsome v. United States,* 434 F.2d 907 (5th Cir. 1970); *Seymour v. Oceanic Navigating Co., Ltd.,* 453 F.2d 1185 (5th Cir. 1972); *Silberblatt, Inc. v. United States,* 353 F.2d 545 (5th Cir. 1965).

12. Appendix "B", *infra,* p. 25.

13. *Manning v. SEA ROAD,* 417 F.2d 603 (5th Cir. 1969); *Phipps v. SANTA MARIA,* 418 F.2d 615 (5th Cir. 1969); *Denny v. Jugoslavenska Oceanska Plovidba,* 455 F.2d 1277 (5th Cir. 1972).

14. In *Manning,* an open manhole rendered the vessel unseaworthy *per se,* and the Court of Appeals reversed the finding of 100% contributory negligence even though the injured longshoreman had previously been warned of the condition and merely walked into the open manhole.

regulation constituted unseaworthiness as a matter of law with the plaintiff's percentage of contributory negligence limited to a maximum of 50% in order to place the burden on the employer rather than the employee. In *Denny*,[15] the Appellate Court reversed the District Court decision that the plaintiff was 100% contributorily negligent, even though there was only a technical violation. See also *Phipps v. Santa Maria*, 418 F.2d 615 (5th Cir. 1969).

These decisions from the Fifth Circuit have negated the full range of comparative fault. In other words, the principle of comparative fault contemplates the vessel owner's liability being diminished anywhere from 0% to 100% by the plaintiff's own contributory negligence. The principle established by the Court of Appeals for the Fifth Circuit in these situations has in effect diminished the comparative fault area to a percentage of between 0% and 50%. The present case seeks a further extension of this concept by refusing contributory negligence in a "near violation" situation when the Plaintiff recognized his dangerous position between the load and the edge of the stow.[16]

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15. In *Denny*, the District Court found that the injured longshoreman jumped over the bulkhead and landed on a ladder on the deck. Even though the District Court concluded that the Safety & Health Regulations for Longshoring had been violated by the presence of the ladder on the deck, the District Court found that the cause of the plaintiff's injury was his own negligence in vaulting the bulkhead instead of using a more prudent manner of coming onboard the vessel. The Court of Appeals reversed and remanded for an apportionment of the damages whereby the shipowner would bear at least 50% of the plaintiff's damages.

16. Petitioner attaches pertinent portions of the Appellant's Brief as Appendix "C" in order to provide a full discussion of the facts developed at the District Court level.

In the present case, the entire burden of the unseaworthy condition is placed on the shipowner due to the "near violation" irrespective of the negligent activity of the injured longshoreman in bringing into play the unseaworthy condition. The application and extension of this principle is directly opposed to the theory of comparative negligence which is ingrained in the admiralty and maritime law of the United States. Hence, the conclusion of "no contributory negligence" cannot be allowed to stand without further explanation by the District Court and/or the Court of Appeals for the Fifth Circuit. If, as suspected, this decision stands for the principle that a violation of the safety regulation will not allow any contributory negligence to be placed on the Plaintiff, then this principle has negated comparative fault in the admiralty and maritime law of the United States to such an extent that this case must be reversed or else previous decisions of this Court on comparative fault must be questioned.[17]

3.

PETITIONER IS ENTITLED TO A PANEL OF JUDGES WHO WILL GIVE ADEQUATE CONSIDERATION TO THE ISSUES PRESENTED BY THE APPEAL.

The appeal filed by the vessel owner in the captioned cause was placed on the Summary Calendar by the United States Court of Appeals without the parties being given

17. The concept of comparative fault clearly applies in litigation involving longshoremen and shipowners. In fact, the Congress has recently stated its intention to continue the applicability of the comparative negligence principle in dealing with litigation between longshoremen and shipowners after the passage of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act. Senate Committee Report No. 92-1125, p. 12.

the opportunity to present oral argument. Petitioner cannot determine the consideration which was subsequently given to the Appellant's Brief and the Record from the trial court, but the opinion contains such material misstatements that the panel of judges could not have directed adequate attention to the points which were presented.

The opinion below classified the injured longshoreman's action as being pursuant to the Longshoremen's & Harbor Workers' Compensation Act, while in fact the action was one for an unlimited monetary recovery pursuant to the general maritime law.[18] The burden of proof possessed by the injured party in an action for compensation is substantially less than in litigation under the general maritime law, and this misapprehension may well have brought about the affirmance of the trial court. Additionally, the opinion stated that "Lykes was concededly remiss in failing to comply with a federal regulation,"[19] while even a cursory review of the record shows that this was the very issue which was the subject matter of the appeal. Finally, even though the Court of Appeals recognized that the "record is replete with discrepancies in the testimony on this matter," the fact finding of eight feet was affirmed summarily because "this is not an appropriate case for reversal under the clearly erroneous standard.[20] The Appellant's Brief did not seek to escape the "onerous burden" under the "clearly erroneous" rule in objecting to the fact finding regarding the height of the stow; however, the Petitioner sought reversal on the basis of the clearly erroneous rule and the unbelievable

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18. Appendix "B", *infra*, p. 24.
19. Appendix "B", *infra*, p. 24.
20. Appendix "B", *infra*, p. 25.

reliance upon the demonstrated perjured testimony of the Respondent and his longshoreman-witness accomplice.[21] If the District Court refuses to consider perjury and a clear conspiracy to manipulate litigation in the District Court, then the only avenue of relief available to the aggrieved party is to request a thorough review by the Court of Appeals; and, the Petitioner strongly objects to the refusal for a thorough consideration of a record "replete with discrepancies."

It is conceded that the Circuit Court below has a congested docket, but this is no excuse for a sloppy opinion which demonstrates beyond question that the appeal was decided without adequate time and consideration being given to the issues. Petitioner is entitled to a panel of judges who will give adequate consideration to the issues raised on appeal and who will thereafter author an opinion which correctly states the nature of the appeal and the issues presented. If for no other reason, this writ should be granted for the purpose of demonstrating to the Circuit Court that each litigant is entitled to adequate consideration of the factual and legal issues and that the "clearly erroneous" rule of this Court is not a "rubber stamp" for affirmance when the facts are "replete with discrepancies."

CONCLUSION

The basis of the admiralty and maritime law is derived from the Constitution of the United States. The formulation and creation of the admiralty law has been left

21. Respondent Brown's testimony at trial was in direct contradiction to his sworn deposition testimony on all relevant issues concerning the height of the stow. The Petitioner attaches an extract from the Appellant's Brief demonstrating conflict in Respondent's testimony at the time of trial and on deposition as "Appendix D."

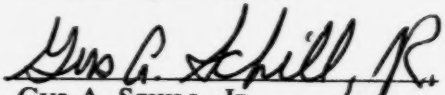
largely to the innovations of this Court. The United States Court of Appeals for the Fifth Circuit has now concluded that the violation or the "near violation" of a regulation constitutes unseaworthiness of a vessel as a matter of law. This unwarranted extension cannot be allowed or sanctioned as its logical conclusion is the imposition of the duty to furnish an accident-free ship to the longshoremen and other persons entitled to the warranty of seaworthiness. This obligation has been specifically denied by this Court in *Mitchell v. Trawler RACER*, 362 U.S. 539, 4 L.Ed.2d 941, 80 S.Ct. 926 (1960), in the following language:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L.Ed. 354, 77 S.Ct. 382."

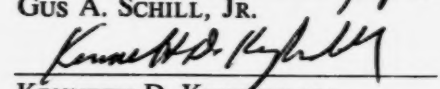
Hence, even if this Court should agree that the breach of the regulation imposes liability on the vessel owner in the appropriate circumstances, the fact is that a breach must be shown in order to bring into play this rule of law. In the present instance, no breach has been shown and no unseaworthy condition can be imagined or fabricated from a "near violation." After all, if the regulations are used as a standard, then there must be positive proof to show that they were violated before imposing liability on the basis of the violation of such standard. In this

case, there has been no violation, and this case must be remanded to the lower Court for further consideration.

Respectfully submitted,



GUS A. SCHILL, JR.



KENNETH D. KUYKENDALL

Attorneys for Petitioner

Of Counsel:

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713/224-8380

CERTIFICATE OF COUNSEL

I certify that the foregoing Petition for Writ of Certiorari has been served upon Mr. Atreus Clay, 5643 Turtle Creek, Houston, Texas, attorney for Respondent, by mailing a copy of said Petition by certified mail, return receipt requested, on this 27 day of November, 1973.

Of Royston, Rayzor, Cook & Vickery

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. F. BROWN, Plaintiff

versus

LYKES BROS. STEAMSHIP CO., INC., *In Personam*, and SS LIPSCOMB LYKES, *In Rem*, Defendants

C. A. No. 71-H-582

This is a longshoreman's action for personal injuries. The case was tried on the question of liability only before the Court sitting without a jury on December 12, 1972, and taken under submission. The Court after considering the testimony, exhibits, and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff, Mr. M. F. Brown, was employed as a longshoreman aboard the SS LIPSCOMB LYKES which is owned and operated by the defendant, Lykes Bros. Steamship Co. Inc. On April 17, 1971, the vessel was moored in the Port of Houston and was taking aboard approximately 450 bales of compressed cotton. Mr. Brown was working in the number 1 lower hold stowing the cotton.

2. The cotton was in bales which measured approximately 2 feet by 2 feet by 5 feet. It was being loaded by means of a rope sling which held three bales to a load.

3. When Mr. Brown and the rest of the gang reported for work at 1:00 p.m. they found that there were several large wooden crates in the number one hold, forward end. The stowage plan indicated that these had a combined weight of several tons and some were at least six feet tall. The cotton was to be loaded around these crates in the forward half of the number one hold. The crates were to help form a bulkhead midway in the hold which would allow room for other cargo in the after end of the hold.

4. Loading of cotton at the Port of Houston is paid for on a piecework basis rather than an hourly rate. The testimony indicated that the longshoremen worked very efficiently when loading under this plan of compensation. As the cotton is loaded the longshoremen attempt to keep as level a working floor as possible. The bales are first placed in the wings and bow and then in the hatch opening. When placing the bales in the wings and bow, the sling is unhooked and the bales are rolled off the sling. When the bales are to be placed in the hatch opening one end of the sling is unhooked and the longshoremen lift the ends of the bales to allow the winch to pull the sling from beneath the bales since there is little room to roll the bales off the sling in this location.

5. About 3:00 p.m. Mr. Brown and the other longshoremen were unloading a sling load of bales which would nearly complete the fifth layer of bales. As they lifted the ends of the bales the winch began to pull the sling from under the bales. The sling caught on some obstruction and became taut, causing the bales to shift

and knocking Mr. Brown off the cotton and down into the hold of the vessel causing the injury to his back here complained of.

6. Because of the height of the bulkhead, Mr. Brown was unable to climb up the bulkhead of cotton and crates and thus went up the stairs to the side. He reported his injury to the timekeeper and then, along with the rest of the gang in the hold, changed jobs and went to work dockside. The loading was finished at 4:45 p.m.

7. There was no safety net or rope ever placed at the bulkhead. The walking foreman indicated that a rope or net is put up when the longshoremen are working around a similar bulkhead of eight feet or more of general cargo but when cotton is being loaded, he stated it was up to the longshoremen to request a net. Evidently this is a result of the desire for speed in the loading of cotton encouraged by the piecework method of payment.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. 1333.

2. The Plaintiff is entitled to a seaworthy vessel since he was a longshoreman employed by the owners of the vessel and in the process of loading cargo. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); *Reed v. SS YAKA,* 373 U.S. 410 (1963).

3. The SS LIPSCOMP LYKES, at the time of plaintiff's accident, was unseaworthy and not reasonably fit for its intended use, because of the failure to have a safety net or other similar device at the cargo bulkhead. There was ample time for a net to be provided and plain-

tiff at the time of his injury was working at such a height and location as to require a net or other device. 29 C.F.R. 1918(b) provides:

> When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adeqate strength to prevent injury to a falling employee or by other means providing equal protection under the existing circumstances.

The failure to comply with the Safety and Health Regulations for Longshoring may constitute an unseaworthy condition. *Manning v. MV "SEAROAD"*, 417 F.2d 603 (5 Cir. 1969).

4. The unseaworthy condition of the vessel is the sole proximate cause of the injury and there was no contributory negligence on the part of the plaintiff in mitigation.

It is therefore ORDERED, ADJUDGED and DECREED that the Court determines liability in this case consistent with the above Findings of Fact and Conclusions of Law and if damages cannot be stipulated between counsel within thirty (30) days from date of this order, the case will be set for a determination of damages.

Costs to be paid by the defendant.

DONE THIS the 2nd day of January, 1973.

/s/ DANIEL H. THOMAS
United States District Judge

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1572
Summary Calendar*

M. F. BROWN,
Plaintiff-Appellee,

versus

LYKES BROTHERS STEAMSHIP COMPANY, INC., *in personam*, and SS LIPSCOMB LYKES, *in rem*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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(August 31, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: This is an admiralty case brought by appellee Brown against appellant Lykes Brothers Steam-

* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

ship Company, Inc. (Lykes) under the Longshoremen's & Harbor Workers' Compensation Act.[1] Brown, a longshore-employee, sought damages for an injury incurred while working in the hull of Lykes' ship, maintaining that his injury was occasioned by a breach of the vessel's warranty of seaworthiness.

The district court found that at the time of the injury, Brown and other longshoremen were unloading a sling load of bales of cotton which would nearly complete the fifth layer of bales. As they were lifting the ends of the bales the winch began to pull the sling from under the bales, and the sling caught on an obstruction and became taut, thereby causing the bales to shift and knock Brown off of the stow into the hold of the vessel. Since each layer of cotton was two feet thick and Lykes was concededly remiss in failing to comply with a federal regulation which requires a shipowner to guard the edge of stowed cargo with a safety net when such cargo is 8 feet high,[2] the district court found that the warranty of seaworthiness had been breached. It also concluded that the unseaworthy condition of the vessel was the sole proximate cause of

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1. 33 U.S.C. § 904 (1970). Although the Longshoremens' & Harbor Worker's Compensation Act unequivocally states that "liability of an employer prescribed in Section 904 of this title shall be exclusive," 33 U.S.C. § 905 (1970); Reed v. S.S. YAKA, 373 U.S. 410 (1963) announced the rule that a longshore-employee may institute an action against his shipowner-employer based upon the vessel's warranty of seaworthiness.

2. Stowed cargo and temporary landing platforms, 29 C.F.R. § 1918.32(b) (1972):

> When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the circumstances.

the injury and that Brown was free from contributory negligence. We affirm.

Lykes' first contention is that the finding of the district court that the stow upon which Brown worked was of such height and location as to require the net was clearly erroneous. The record is replete with discrepancies in the testimony on this matter. Consequently, this is not an appropriate case for reversal under the clearly erroneous standard.[3]

Lykes' second contention is that the district court's finding of no contributory negligence is incorrect as a matter of law. We also find that contention to be without merit.[4]

For the reasons set forth above, we affirm the judgment of the district court.

AFFIRMED.

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3. See McAllister v. United States, 348 U.S. 19, 20 (1954); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948); Ward v. Hobart Manufacturing Co., 450 F.2d 1176, 1182-83 (5th Cir. 1971).

4. On occasion, this court has deemed a remand necessary to insure compliance with F.R.C.P. 52(a). *See* Lettsome v. United States, 434 F.2d 907, 909 (5th Cir. 1970). However, where a finding of a subsidiary fact inheres in the finding of an ultimate fact, a remand is not required. *Cf., e.g.,* United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962). Findings similar to those made herein have frequently been sustained against challenges of insufficient precision. *See, e.g.,* Gulf King Shrimp Company v. Wirtz, 407 F.2d 508, 515 (5th Cir. 1969); Compania Anonima Venezolano De Navegacion v. Matthews, 371 F.2d 971, 973 (5th Cir.), *cert. denied*, 389 U.S. 820 (1967).

APPENDIX "C"

Contributory Negligence
Extract From Appellant's Brief

In this case, the Court need not remand the case to the District Court to make subsidiary findings so that the Court can evaluate the findings of the District Court on contributory negligence since the facts establish contributory negligence as a matter of law. Basically, the facts are not in dispute concerning the position of Longshoreman Brown immediately prior to his injury. Brown and the witness whom he called agreed that Appellee was positioned aft of the bale which struck him approximately two or three feet from the edge of the stow. In fact he remained between the after end of the bale and the edge of the stow while the winch operator was pulling the cotton sling from beneath the stow[60] although the areas on both sides of the bale were clear. Thus, if this Court refuses to overrule the District Court's finding that the height of the stow was over eight feet and constituted a dangerous condition, Brown's position between the load and the end of the stow would compel the conclusion of contributory negligence for placing himself in a position of peril despite safer alternatives readily available to him.

Common sense and logic demand the conclusion that Brown could have positioned himself at the side of the load as soon as he had hooked the cotton sling onto the cargo hook. The contention of Brown's attorney that he had no choice but to remain in such a dangerous position runs counter to the prudent man test.[61] In fact, the only reason that Brown remained in this position was his own negligence in exposing himself to the danger of the

60. Brown App. 42, 43.
61. App. 143.

unguarded stow. It was not safe for Brown or any other longshoreman to stand in the position assumed by Brown in view of the fact that the cotton sling might well hang on an object beneath the cotton load and a longshoreman could easily be knocked from the end of the stow.[62]

Opposing counsel continually maintained that Brown was aware of the dangerous working conditions prevailing onboard the SS LIPSCOMB LYKES at the time of his injury, but his conduct did not merit a finding of contributory negligence because he had "no choice" but

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62. Walking Foreman Peterson's testimony is very persuasive on this point. (Peterson App. 103, 104).

> Q. Mr. Peterson, I would like for you to give a hypothetical fact situation for me. Assume we are loading a load of cotton, three bales, into the hatch square. Assume it is landed on the offshore side near the center of the hatch. The load is landed approximately four or five feet from the end of the hatch. The longshoreman handling the sling is standing between the load and the end of the stow. And no safety net. Would you recognize this position as being a safe position being assumed by that longshoreman?
> A. No, sir.
> Q. Why?
> A. You can get knocked off there real easy.
> Q. Why can you get knocked off? You are just pulling a sling.
> A. Anything can happen if the sling is loose.
> Q. When you are pulling underneath the cotton, quite often does the sling jump up?
> A. Yes, sir.
> Q. Flip you up?
> A. Yes, sir.
> Q. This isn't infrequent for it to do that?
> A. It goes everywhere.
> Q. Each one of the four-man group has a sling man?
> A. Yes, sir.
> Q. What is the job of the sling man; what does he do?
> A. He handles the sling, unhooks the load after it lands. He hangs it on the hook. The men go ahead and go after another load.

to perform his work in such dangerous surroundings.[63] According to Brown, he was obliged to maintain his position between the load and the end of the stow in order to hook the cotton sling onto the cargo hook so that the winch operator could pull the sling from beneath the load.[64] Moreover, the testimony established that Brown and the other longshoremen were to install the safety net when the height of the stow exceeded eight (8) feet, and a safety net was available in the gear box.[65] In addition, according to Walking Foreman Peterson, the longshoremen would not install a safety net when working cotton cargo because the pay is predicated upon the number of pieces worked instead of an hourly rate, and the longshoremen would not terminate cargo operations to position the safety net, even if the height of the stow exceeded eight feet.[66] The failure of the employer to insure the installation of the safety net when the height of the stow was in excess of eight feet could be used as a predicate for finding an unseaworthy condition; nevertheless, this determination only concerns the liability of the employer, and such determination does not answer the question of the negligence of the employee in continuing to work in a known dangerous condition when he could have installed the safety net, or else positioned himself to the side of the stow in view of the absence of the safety net.

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63. App. 143.
64. Brown App. 42, 43.
65. Peterson App. 106, 107.
66. Peterson App. 107.

APPENDIX "D"

Respondent's Testimony From Appellant's Brief

The most crucial testimony in the entire case was the testimony of Brown. His estimate of the height of the stow, the number of floors, and the boxes protruding above the stow at the time of his injury were inconsistent at the time of trial when placed within the context of his pre-trial deposition testimony. In order to illustrate this point clearly, we recite the Plaintiff's deposition testimony and the trial testimony as follows:

TRIAL TESTIMONY	DEPOSITION TESTIMONY
1. *Number of cotton floors stowed at the time of injury*	
Q. (By Mr. Clay)[38] Will you estimate the number of floors of cotton you had in at the time of your injury? A. *I believe we had four complete floors and were working the fifth floor.* (Emphasis added) (Brown App. 17)	Q. (By Mr. Kuykendall)[39] And you were standing on the second floor— A. No, I was either on the—*I think I was on the third floor.* We done gone up three floors, I think. (Emphasis added) (Brown App. 32, App. 256).
2. *Box protruded above surface of cotton cargo at the time of injury.*[40]	

38. Mr. Clay was Brown's attorney, and the testimony recited herein was elicited upon direct examination.

39. Mr. Kuykendall was the shipowner's attorney, and the testimony recited herein was elicited upon cross-examination at trial and at deposition.

40. This point is of significance since all parties concede that the box was six feet high.

Q. Would you tell us whether you had gotten a bale of cotton over this big box?

A. Yes, sir. A bale of cotton was all the way over.

Q. All of the boxes in the hatchway, just the hatchway, were covered with cotton?

A. Yes, sir. I think the wings might have been. I don't know. The hole, you could see down in it. There was a box. You could look in that hole and see boxes.

Q. So to make sure, this box is at least six feet tall?

A. Yes, sir.

Q. We have got at least a one or two foot bale of cotton on top of it?

A. Yes, sir.

Q. So we have better than eight feet—

A. Yes, sir.

Q. —in the hatchway bulkhead?

A. Yes, sir.

Q. What was directly beneath this eight feet?

A. Empty deck.

(Brown App. 17, 18)

Q. Now, had you gone up three floors?

A. Yeh, in parts of it.

Q. O.K. You were standing on the third floor.

Yeh.

Q. O.K.

A. Third or fourth, I'm not sure which. I really don't know if it was the third or fourth because I know I was—boxes that—the highest boxes, we was up even with them then.

Q. You mean the floor you were standing on was even with the highest boxes?

A. Yeh. All but I think it was two little ends sticking up on two boxes.

(Brown App. 32, 33, Brown App. 256).

3. *Height of stow at time of injury*

Q. This what you fell off of?

A. Yes, sir.

Q. You fell eight feet down.

The Court: Let me hear it from him.

Q. (By Mr. Clay) Mr. Brown, how far did you fall?

A. I'd say eight, ten feet.

Q. How did you arrive at that?

A. Well, the boxes was taller than my head. And a bale of cotton all the way across the hatch over them. I know I couldn't climb back up it. I reached seven feet to get hold of the top of a bale. I was looking around for cargo board to climb back up on top.

(Brown App. 17, 18)

Q. Okay. And how high would you estimate the distance that you fell from?

A. I'll say between five and seven feet—five or seven feet—eight feet, 10 feet, I don't know. I really —I know that I couln't climb back up—come back up on it, that I had to go around and climb up the wall to get back up there where we was working.

Q. You estimate the distance, the height of the bale on which you were standing was about five to seven feet; is that right?

A. You mean up?

Q. Yes, up from the deck.

A. Yeah, yeah.

(Brown App. 34, 35; Brown App. 281).

Brown was confronted with his deposition testimony on cross-examination, but his replies were absolutely without merit.[41] Accordingly, considering only the trial testimony and deposition testimony of Longshoreman Brown,

41. Brown's only explanation for estimating the height of the stow at "5-7 feet" and the floor on which he was working as the "third floor" was that he had relied on the height of the boxes.

it is impossible to conceive that this testimony convinced the Trial Court that the height of the stow was in excess of eight feet. The fact is that Brown's deposition and trial testimony are completely inconsistent, and there is no way to reconcile the two versions of the accident. Brown estimated the height of the stow by use of the boxes at deposition and at trial—at the time of the deposition, the highest boxes were not covered by cotton and had "two ends sticking up" above the cotton cargo; while at the time of trial, a floor of cotton had been placed on top of the six foot boxes.[42] The best that can be said for the Plaintiff's testimony is that Plaintiff did not really know the height of the stow and the number of floors of cotton which had been loaded at the time of injury. An objective conclusion is that Brown perjured himself at the time of trial.[43]

According to Brown at trial, this box on the offshore side was about six feet tall, and it had at least one floor of cotton on it (Brown App. 32-35, 40, 41). When questioned further with respect to his deposition testimony stating that the boxes had not been covered at the time of his injury, Brown merely stated that he meant the boxes were still "sticking up from the first floor" and not at the time of his injury (Brown Tr. 49). Nevertheless, even a casual reading of Brown's deposition testimony shows that he affirmatively testified that the boxes were "sticking up" from the cotton stow at the time of his injury and that the longshoremen had not loaded the first floor of cotton over the highest boxes at the time of his injury. Brown's deposition testimony is set out in Appendix C for the Court's ready reference.

42. Brown App. 17, 18, 30, 31, 34, 35.

43. In addition to these flagrant discrepancies between the deposition and trial testimony, Brown's testimony on other points should be considered. At trial, he testified that there were "close to 300 bales" of cotton in the No. 1 lower hold at the time of his injury; however, on deposition, he testified that he could not estimate the number of bales loaded into the No. 1 lower hold at the time of his injury (Brown App. 27, 28). Likewise, at trial Brown testified that he had been working about one and one-half to two hours at the

time of his injury; however, upon cross-examination, he was confronted with his deposition testimony, and he admitted that he had only been working about one hour to one and one-half hours (Brown App. 138). Also, even though Brown testified that he had proceeded to work at loading cotton at 1:15 P.M. in accordance with the stevedore's records, at trial he claimed that the longshoremen were not obliged to rig the hold before loading the cotton (Brown App. 138, 139); however, on his deposition, he testified that the longshoremen had required approximately thirty minutes to rig the hold and to move boxes around in the cargo area (Brown App. 138, 139). Thus, upon the basis of his deposition testimony, the longshoremen would have worked from about 1:15 to about 1:45 rigging the hold, moving boxes, and obtaining dunnage before cotton loading operations commenced. Therefore, if the injury occurred at precisely 2:30 or "about 3:00 P.M." there is no way that the longshoremen could have loaded cotton to a height exceeding eight feet and be finishing the next floor.